FINAL AWARD DENYING COMPENSATION

Injury No.: 08-105050

Employee: Jayson Brockhouse

Employer: Shelton Construction & Services, Inc.

Insurer: American Interstate Insurance

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award of the ALJ dated March 12, 2012, by issuing a separate opinion denying compensation in the above-captioned case.

Preliminaries

The ALJ conducted a hardship hearing in this matter on March 8, 2010. On May 24, 2008, the ALJ issued a Temporary or Partial Award, finding that employee failed to meet his burden of proof with respect to notice and medical causation. Employee appealed the Temporary or Partial Award by filing an Application for Review with the Commission. On June 30, 2010, the Commission dismissed employee's Application for Review.

On March 17, 2011, the ALJ dismissed employee's claim altogether for failure to prosecute. Employee appealed the ALJ's dismissal by filing a second Application for Review with the Commission. On April 29, 2011, the Commission issued an order setting aside the ALJ's Order of Dismissal and reinstating employee's claims against employer and the Second Injury Fund.

A final hearing took place on December 7, 2011. At the final hearing, counsel for employer requested that the ALJ take judicial notice of the legal file and the evidence, including the transcript, submitted in the prior hardship hearing held on March 8, 2010; counsel also requested that the court take judicial notice of the Temporary or Partial Award issued in that hardship hearing. Employee did not offer a response to employer's request. Therefore, the ALJ granted employer's request to take judicial notice of the official file, the Temporary or Partial Award, and the evidence submitted in the hardship hearing.

Following the final hearing, the ALJ again found that employee failed to meet his burden of proof with respect to notice and medical causation and, consequently, denied employee's claims against employer. Employee appealed the ALJ's award by filing a third Application for Review with the Commission. Employee's primary points of contention center on the ALJ's findings with respect to notice and medical causation. Specifically, employee

[1] Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

alleges the following: 1) Employee provided proper notice of the May 30, 2008, accident to employer; 2) Employer had actual notice of the accident; 3) If employer did not have notice of the accident, it was not prejudiced by the same; and 4) Employee met his burden of proof with respect to medical causation. Employee also argued that the ALJ erred in excluding from evidence multiple x-rays employee offered at the final hearing.

Employer filed an Answer to employee's Application for Review and also requested that the Commission dismiss the Application for Review. Employer alleged that the Application for Review failed to comply with 8 CSR 20-3.020(3) (A) because it does not specifically state the reason employee believes the findings and conclusions of the ALJ are not properly supported. On April 4, 2012, the Commission issued an order denying employer's request to dismiss the Application for Review.

We note that for reasons unexplained the transcript to the March 8, 2010, hardship hearing is not available for our review. However, the exhibits admitted into evidence at the hardship hearing are available and were incorporated into the transcript of the December 7, 2011, final hearing.

In a letter dated May 16, 2012, the Commission informed both employer and employee that the hardship hearing transcript is not available and requested that the parties inform the Commission if the absence of the March 8, 2010, testimony deprives the Commission of evidence necessary to its review. Both employer and employee responded by affirmatively stating that the absence of the March 8, 2010, testimony will not deprive the Commission of evidence necessary to its review.

Findings of Fact

On May 30, 2008, employee used his hard hat to "tap" his coworker, Seth Waters, on his head; Mr. Waters was wearing a hard hat at the time. Mr. Waters retaliated by using his hard hat to do the same to employee; employee was also wearing a hard hat when Mr. Waters retaliated. Employee alleges that after Mr. Waters hit him on top of his head with his hard hat that he experienced immediate neck pain and headaches.

Approximately five days after the hard hat incident, employee presented to Dr. Hale's office on June 4, 2008, with a chief complaint of fever and lung symptoms with his chest feeling full. He described wheezing, coughing, chills, and nausea. He also reported that an electric current had gone through his feet two weeks ago, and that he had had right elbow pain since being struck by the electric current. Employee further noted that he was hit on the back of his head with a hard hat on the Friday before; however, he had full range of motion and did not complain of neck pain. Employee was diagnosed with a fever and cough. Employee returned to Dr. Hale's office the following day, June 5, 2008, for a follow-up visit with respect to the fever and cough. The doctor noted that employee had a decreased cough at that time and was not having any pain. Employee's neck exhibited full range of motion. He was assessed with a resolving fever.

Employee last worked for employer on July 23, 2008.

Nearly two months after the hard hat incident, on July 29, 2008, employee visited the Heartland Chiropractic Clinic. Employee reported that "Seth hit me on my head with his safety helmet." He described neck pain, stiffness, and tingling or numbness of the arms, elbows, hands, and feet. Employee was told to limit lifting to 25 pounds through August 5, 2008.

On June 4, 2009, more than one year after the hard hat incident, employee had x-rays performed, which showed mild degenerative changes at the C6-7 disc space level. No recent or destructive pathology was found. The MRI performed on June 8, 2009, revealed broad-based disc bulges causing probable clinically significant lateral recess narrowing and cord signal changes at C5-6 and C6-7. An MRI of the brain, also taken June 8, 2009, revealed no significant abnormalities.

Dr. Pineda evaluated employee on June 16, 2009, and explained that the June 2009 MRI demonstrated fairly significant disc disease at C5-6 and C6-7. The x-ray report reflects under history "Neck pain. Pain for 15 years after being kicked over the head." Dr. Pineda recommended therapy, and instructed employee to avoid falls, including avoiding the use of ladders.

Prior to the May 30, 2008, incident, employee suffered several injuries to his neck or back. We find that the facts regarding employee's prior neck or back injuries were accurately recounted in the award of the ALJ and are adopted and incorporated by the Commission herein.

On November 5, 2009, Dr. Volarich performed an independent medical evaluation of employee. Dr. Volarich opined that the work accident of May 30, 2008, was the prevailing or primary factor causing the disc herniations at C5-6 and C6-7. Dr. Volarich recommends that employee undergo cervical epidural steroid injections to see if it helps his symptoms. Dr. Volarich opined that as a result of the May 30, 2008, injury employee sustained 65% permanent partial disability of the body as a whole rated at the cervical spine.

Even though employee conceded to having been seen at Heartland Chiropractic Clinic for cervical and thoracic pain on 26 separate visits between September 14, 2007 and December 7, 2007, Dr. Volarich's report does not reference any of employee's treatment for this period.

Dr. Doll evaluated employee on January 20, 2010. Dr. Doll thoroughly reviewed employee's medical history and his ongoing complaints. Dr. Doll concluded that any need for further treatment or restrictions would not be the result of the work accident of May 30, 2008. He opined that the work incident was not the prevailing factor or substantial factor in the medical causation for the significant multi-level degenerative condition of the cervical spine, chronic neck pain, and current associated symptomology, including neck pain, limited motion, and diffuse pain and paresthesias of the extremities. Dr. Doll opines that those findings are unrelated to the May 30, 2008, injury and instead are related specifically to employee's preexisting, multi-level degeneration of the cervical spine, including disc osteophyte complexes at C5-6 and C6-7, chronic neck pain, and chronic pain paresthesias of his extremities.

Dr. Doll does relate a diagnosis of head contusion and mild cervical strain to the May 30, 2008, work injury, with the caveat that this is assuming that the incident occurred as employee asserts. However, Dr. Doll finds that there is no need for further medical treatment related to the May 30, 2008, incident, and rates employee's disability as a result of the incident at 0%.

Discussion

Notice

Section 287.420 RSMo provides, in relevant part:

> No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

The ALJ found that the credible evidence shows that employee did not provide the required notice to employer. The ALJ further found that employer did not have actual notice of the accident. Finally, the ALJ found that employee failed to meet his burden of proving that employer was not prejudiced by its failure to receive notice.

In arriving at said conclusions, the ALJ relied heavily on the hardship hearing testimony of employer's witnesses, Dennis Killday and Mike Paalher. Said testimony was incorporated into the final hearing, but as mentioned above, the transcript from the hardship hearing is not available for our review. In light of the foregoing, we find that the record is insufficient for the Commission to properly review and rule on the ALJ's findings with respect to the issue of notice. Therefore, we confine our findings to the only other issue before us, medical causation.

Medical Causation

An injury under Missouri Workers' Compensation Law is compensable "only if the accident was the prevailing factor in causing both the resulting medical condition and disability…." *Payne v. Thompson Sales Co.*, 322 S.W.3d 590, 592 (Mo. App. 2010), citing § 287.020.3 RSMo.

The Court in *Brundige v. Ingelheim*, 812 S.W.2d 200 (Mo. App. 1991) held that "[m]edical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Id*. at 202.

Contrary to our determination with regard to the issue of notice, we find that the record is sufficient, even without the hardship hearing testimony, to rule on the issue of medical causation. While the issue of notice required a thorough review of employer's witnesses' hardship hearing testimony, the issue of medical causation is predominantly dependent on a review of the medical opinions. Among other exhibits and testimony, the medical records, reports, and expert testimony were all included and incorporated within the record before us. For the foregoing reasons, we find that we have properly

reviewed the ALJ's findings with respect to medical causation in accordance with Missouri Workers' Compensation Law.

With that said, we find that the ALJ thoroughly reviewed the evidence and came to a well-reasoned conclusion that Dr. Doll's opinions are more convincing than Dr. Volarich's.

For the foregoing reasons, we affirm the ALJ's finding that employee's ongoing problems with his neck were the result of a longstanding degenerative and chronic problem and that the May 30, 2008, incident was not the prevailing factor in causing employee's medical condition or any disability employee might have.

With respect to the x-ray films employee alleges the ALJ erred in excluding from evidence, we find that the ALJ properly sustained employer's objections and ruled that the x-ray films were inadmissible. The x-ray films were not certified or properly identified.

Award

As indicated above, we find that the record is insufficient for the Commission to properly review and rule on the ALJ's findings with respect to the issue of notice. However, because the record is sufficient to rule on the dispositive issue of medical causation, we affirm the ALJ's award denying employee's claims against employer by separate opinion.

The award and decision of Administrative Law Judge Vicky Ruth, issued March 12, 2012, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 28th day of September 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jason Brockhouse

Dependents: N/A

Employer: Shelton Construction & Services, Inc.

Additional Party: Second Injury Fund (left open)

Insurer: American Interstate Insurance

Hearing Date: December 7, 2011

Injury No. 08-105050

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

2. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.

4. Date of accident or onset of occupational disease: Alleged May 30, 2008.

5. State location where accident occurred or occupational disease was contracted: Near Newark, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? No.

8. Did accident or occupational disease arise out of and in the course of the employment? See Award.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes .

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee struck a coworker on the head with his hardhat; the coworker retaliated by striking employee on the head with his hardhat.

12. Did accident or occupational disease cause death? No. Date of death? N/A.

13. Part(s) of body injured by accident or occupational disease: alleged to be body as a whole referable to the cervical spine.

14. Nature and extent of any permanent disability: None.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? $733.67, per agreement of the parties.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: $733.61.

19. Weekly compensation rate: $489.07 TTD / $389.04 PPD.

20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: None.

22. Second Injury Fund liability: N/A.

23. Future medical awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jason Brockhouse

Dependents: N/A

Employer: Shelton Construction & Services, Inc.

Additional Party: Second Injury Fund

Insurer: American Interstate Insurance

Injury No: 08-105050

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

On December 7, Jason Brockhouse and Shelton Construction & Services, Inc./American Interstate Insurance appeared for a final award hearing. Jason Brockhouse, the claimant, represented himself. The employer and insurer were represented by David Morin. The Second Injury Fund chose not to participate in the hearing. Jason Brockhouse testified at the trial. The Claimant and the employer/insurer submitted briefs on or about December 23, 2010, and the record closed at that time.

It should be noted that a hardship hearing was held in this matter on or about March 8, 2010. At that hearing, claimant was represented by attorney Robert Keefe. The employer/insurer was represented at the hardship trial by attorney Mark Cero. The administrative law judge issued an Temporary Award finding that there was an accident, but also finding against the claimant on the issues of medical causation and notice.

STIPULATIONS

The parties stipulated to the following:

1. On or about May 30, 2008, Jason Brockhouse (the claimant) was an employee of Shelton Construction & Services, Inc. (the employer).
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by American Interstate Insurance.
4. The Missouri Division of Workers' Compensation has jurisdiction.
5. Claimant alleges that the accident occurred in Newark, Missouri. However, the parties agreed that venue for trial purposes is proper in Adair County.
6. A Claim for Compensation within the time prescribed by law.
7. The claimant's average weekly wage was $733.621, yielding a compensation rate of $489.07 for temporary disability benefits and $389.04 for permanent partial disability benefits.
8. The employer has paid medical benefits in the amount of $733.67.
9. No temporary disability benefits have been paid.

ISSUES

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

1. Accident arising out of and in the course of employment.
2. Medical causation.
3. Notice.
4. Past medical care.
5. Future medical care.
6. Unpaid temporary total disability benefits.
7. Second Injury Fund liability.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit J Helmet without insert.
Exhibit K Helmet with insert.

Although claimant offered additional exhibits, specifically exhibits A – I, objections to those exhibits were sustained and the exhibits were not received into the record.

On behalf of the employer, the following exhibit was admitted into the record:

Exhibit 2 Timesheets.[1]

Note: All marks, handwritten notations, highlighting, and tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings in addition to the facts stipulated by the parties:

1. Jason Brockhouse (the claimant) was employed by Shelton Construction & Service, Inc. (the employer) at the time of the alleged injury on May 30, 2008.

2. On Friday, May 30, 2008, claimant used his hardhat to "tap" his co-worker, Seth Waters, on his head; Mr. Waters was wearing a hardhat. Mr. Waters retaliated by using his hardhat to "tap" claimant on the head; claimant was also wearing a hardhat. Claimant alleges that Mr. Water's actions broke the hardhat that claimant was wearing; claimant's hardhat was admitted as Exhibit K.

[1] The employer/insurer did not offer proposed Exhibit 1.

3. Claimant testified that following this incident, he continued to work. However, he indicated that after the weekend he could not move and could not walk. He testified that he went to Heartland Chiropractic for medical attention.

4. Claimant testified that after he was tapped or hit on his hardhat, he spoke with Mike Paahler or Dennis Killday about going to see a doctor. Claimant indicated that Mike Paahler was his supervisor May 30, 2008, and that Mr. Paahler was the safety person for the employer. Claimant acknowledged that when Mike Paahler was not at work, Dennis Killday was his supervisor.

5. On cross-examination, claimant admitted that page 52 of his deposition read as follows:

> Q: And did you talk with Mike Taylor [sic] or Dennis about going to see a doctor?
>
> A: Not at that time.

6. On June 4, 2008, about five days after the hardhat incident, claimant presented to Dr. Hale's office. Claimant admitted that he presented to Dr. Hale's office with a fever. However, claimant alleges that he mentioned an injury to his neck at a follow up appointment the next day.

7. Claimant indicated that someone from Dr. Hale's office told him to see a chiropractor. When asked whether he had talked to anyone with his employer about seeing a chiropractor, claimant testified that he had. However, when questioned about that statement by counsel for the employer/insurer, claimant admitted that page 54 of his deposition reads as follows:

> Q: And once Dr. Hale told you, or Dr. Hale's office, someone there told you to go see a chiropractor, did you talk to your employer about what doctor to go see?
>
> A: No.

8. Claimant acknowledged that he had gone to Heartland Chiropractic, and that he had been seen at that clinic before the incident with Mr. Waters. Claimant admitted that he had been seen at Heartland Chiropractic in 2007 when he fell down some steps; on September 14, 2007, he presented with a chief complaint of pain in the cervical and thoracic area. Moreover, claimant admitted to having been seen at Heartland on 26 separate visits between September 14, 2007 and December 7, 2007.

9. On cross examination, claimant was asked whether he ever spoke to someone at his employer's business about going to see a doctor for his alleged work injury. Claimant initially testified that he did speak with someone from his employer's business about the need for medical treatment. When questioned by the employer/insurer's attorney, however, claimant admitted that pages 66 and 67 of his deposition read as follows:

Q: So, did you ever talk to anyone at Shelton about going to see a doctor for your condition?

A: I don't think so, but I don't remember.

10. Claimant admitted to having seen Dr. Harvey Scott prior to the 2008 hardhat incident. Claimant conceded that if a medical record, dated July 6, 2004, from Dr. Scott indicated that claimant presented for evaluation of pain and discomfort in his neck with radiating symptoms down the left arm, he would have no reason to refute those findings.

11. Claimant acknowledged that he had a history of prior neck problems. Claimant admitted that he was involved in a motor vehicle accident on July 23, 2001, and that he injured his neck in that accident.

12. Claimant agreed that he saw Dr. Hale on December 21, 2000, with a complaint of falling on ice and hitting his neck, causing a stiff neck.

13. Claimant injured his neck playing football in high school; he saw a chiropractor for what he described as a sprain.

14. After the hardhat incident, claimant continued to ride to and from work with Mr. Waters. Claimant testified that during this period his relationship with Mr. Waters was not difficult or bad.

15. Claimant last worked for the employer on July 23, 2008.

16. Claimant testified that on August 4, 2011, he had surgery on his neck; claimant alleges that the need for surgery arose out of and in the course of employment.

CONCLUSIONS OF LAW

Based upon the findings of fact, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.[2] Proof is made only by competent and substantial evidence, and may not rest on speculation.[3] Medical causation not within lay understanding or experience requires expert medical evidence.[4] When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.[5]

[2] *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).
[3] *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).
[4] *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).
[5] *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.[6] Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.[7]

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."[8]

An "injury" is defined to be "an injury which has arisen out of an in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."[9] An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.[10]

Claimant was not a credible witness. At trial, his demeanor was uncooperative and his presentation confusing and disjointed. It was demonstrated at trial that there are a number of inconsistencies between claimant's testimony and his deposition testimony.

Nevertheless, I find that claimant did tap or lightly hit Mr. Waters' hardhat (head) with his own hardhat, and that Mr. Waters retaliated by tapping or hitting claimant's hardhat (head) with Mr. Waters' hardhat. Claimant, however, admitted that he has a long history of pre-existing and recurrent neck problems. No medical evidence was admitted into the record. I find that claimant did not meet his burden of proof that the hardhat incident caused injury to claimant or that claimant's medical treatment was medically causally related to the hardhat incident. In fact, claimant has failed to prove any element of his claim with competent and substantial evidence. Claimant's claim fails.

[6] *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).
[7] *Webber v. Chrysler Corp*., 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).
[8] Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.
[9] Section 287.020.3(1).
[10] Section 287.020.3(c).

Any pending objections not expressly ruled on in this award are overruled.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation